Filed 4/15/20 P. v. Hawk CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHAWN HAWK,<br><br>Defendant and Appellant. | C089271<br><br>(Super. Ct. No. 95F1702) |

In 1996 a jury found defendant Shawn Hawk guilty of first degree murder and conspiracy to commit murder. (Pen. Code, §§ 182, subd. (a)(1), 187.)[1] We affirmed the

[1] Further undesignated statutory references are to the Penal Code.

resulting conviction in 1997. (*People v. Hawk* (Sep. 15, 1997, C023179) [nonpub. opn.] (Slip Opinion).)[2]

In December 2018 defendant filed a petition for resentencing under newly enacted section 1170.95. The trial court found defendant ineligible for relief in a brief written order, entered without eliciting any response from the People or holding a hearing.

Defendant timely appealed. He contends the trial court failed to follow section 1170.95's procedural requirements. We disagree and affirm the trial court's order.

## LEGAL BACKGROUND

*Senate Bill No. 1437 and Section 1170.95*

On September 30, 2018, the Governor signed Senate Bill No. 1437 (2017-2018 Reg. Sess.). Senate Bill No. 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Effective January 1, 2019, the legislation amended sections 188 and 189 and added section 1170.95 to the Penal Code.

Section 188, which defines malice, now provides in part: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) Section 189, subdivision (e) now limits the circumstances under which a person may be convicted of felony murder:

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[2] On our own motion, we take judicial notice of our opinion affirming the judgment of conviction and sentence in defendant's direct appeal. (Evid. Code, §§ 459, subd. (a) ["The reviewing court may take judicial notice of any matter specified in Section 452"], 452, subd. (d) [permitting a court to take judicial notice of records of "any court of this state"].)

"A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [defining first degree murder] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

The new section 1170.95 permits those convicted of felony murder or murder under the natural and probable consequences doctrine to petition the sentencing court to vacate the conviction and to be resentenced on any remaining counts where: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (*Id.*, subd. (a).)

The petition filed under section 1170.95 must include the following: "(b)(1)(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel."

If the petition is missing any of the information required by section 1170.95, subdivision (b)(1) and that information "cannot be readily ascertained by the [trial] court, the court may deny the petition without prejudice to the filing of another petition and

advise the petitioner that the matter cannot be considered without the missing information." (§ 1170.95, subd. (b)(2).)

Once a complete petition is filed, section 1170.95, subdivision (c) sets out the trial court's responsibilities: "*The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section*.[3] If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (Italics added.)

If the court issues an order to show cause, the court must then hold a hearing within 60 days after the order to show case to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts. (§ 1170.95, subd. (d)(1).) At the hearing, the prosecution has the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (*Id.*, subd. (d)(3).) "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Ibid.*)

## PROCEDURAL BACKGROUND

*Defendant's Petition to Vacate Conviction*

In December 2018 defendant filed a petition to vacate his conviction pursuant to section 1170.95 and attached a declaration. In his petition, defendant stated (1) a complaint, information, or indictment was filed against him, (2) the complaint allowed the prosecution to proceed under a theory of felony murder, (3) he was sentenced to

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**3** The sentence we have italicized for emphasis is the focus of defendant's claim on appeal.

prison for felony murder, (4) he could not be convicted of felony murder under the changes to sections 188 and 189, and (5) he believed he was eligible for relief under section 1170.95.

Defendant's attached declaration set forth his superior court case number, his belief that he could not be convicted of murder given the changes to the law made by Senate Bill No. 1437, and his refusal of appointed counsel. The petition was served by mail on the Shasta County District Attorney and the attorney who represented defendant in the trial court, Jeffrey Jens. (§ 1170.95, subd. (b)(1).) He did not specify the year of his conviction as required by section 1170.95, subdivision (b)(1)(B). He did not include any attachments or exhibits to his petition other than his declaration.

*Trial Court Order*

In February 2019 the trial court summarily denied defendant's petition. The court concluded that defendant failed to make a prima facie showing that he was entitled to relief under section 1170.95. The order stated in full: "Upon review of the basic information, it is clear that [defendant] was convicted of Conspiracy to Commit Murder. One of the required elements of this crime is the specific intent that a murder be committed. That is that someone be killed as described in the crime of murder. This conviction was affirmed by the Third Appellate District in an unpublished opinion September 15, 1997. While there was some conflict in the evidence as to whether [defendant], or his co-participant actually fired the fatal bullet, what is clear is that each harbored a specific intent to kill. It is, therefore, quite clear that the second exception to the new rule[4] applies in this matter to deny relief under section 1170.95."

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**4** "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [defining first degree murder] in which a death occurs is liable for murder only if . . . . [¶] . . . [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree." (§ 189, subd. (e).)

The trial court did not elaborate on what it meant by "Upon review of the basic information"; it did not state whether it had reviewed the abstract of judgment, jury instructions, charging documents, our opinion affirming the judgment, other documents, or some combination of those materials in reaching its determination. The record on appeal does not show that the prosecution responded to defendant's petition.

Defendant timely appealed the trial court's order denying his petition.

## DISCUSSION

### I

### *Summary Denial of 1170.95 Petition*

Defendant contends the trial court erred by summarily denying his section 1170.95 petition. Specifically, he argues that section 1170.95, subdivision (c) required the court to review *only* the four corners of the petition itself when determining if defendant made a prima facie showing that he falls within the provisions of section 1170.95. He relies on the text of the first sentence of section 1170.95, subdivision (c), which provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." Defendant also contends section 1170.95 required the trial court to hold a hearing once it had made its prima facie determination. Finally, defendant contends the court may only determine whether a conviction for conspiracy to commit murder warrants denial of the petition after the hearing.

A. *Standard of Review*

"Because this contention involves a question of statutory construction, our review is de novo. [Citation.] Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them 'their usual and ordinary meaning.' [Citation.] 'The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] 'If the statutory language permits more

than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' [Citation.]" (*Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.)

B. *Analysis*

At the outset, we observe defendant does not dispute that the first sentence of section 1170.95, subdivision (c) required the trial court to make a threshold determination whether defendant had made a prima facie showing that he fell within the provisions of the section, independent of whether appointed counsel was requested,[5] or whether the parties had completed their briefing. Therefore, we assume for purposes of our discussion that section 1170.95, subdivision (c) requires the court to make two prima facie determinations: (1) upon filing of the petition to determine whether defendant falls within the provisions of the section, and (2) after appointment and briefing have occurred to determine if defendant made a prima facie showing he is entitled to relief.[6] We limit our discussion to the issue raised by defendant, namely, whether the trial court may consider documents outside of the four corners of his petition when making its *initial* prima facie determination (as to whether defendant falls within the section).

The text of the section itself is ambiguous as to the scope of the court's initial review. The sentence at issue reads: "The [trial] court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within

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[5] We recognize defendant did not request counsel here.

[6] Two recently published cases concluded that section 1170.95, subdivision (c) requires the trial court to make two *separate* prima facie determinations: one before appointing counsel and receiving briefing, and one after those procedural steps have been taken. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 327-329, review granted Mar. 18, 2020, S260493; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137, review granted Mar. 18, 2020, S260598.) We take no position on that conclusion reached by those opinions, as we need not decide this issue in order to resolve this particular case.

the provisions of this section." (§ 1170.95, subd. (c).) That sentence tasks the trial court with review of the petition itself but also requires a determination and neither specifies nor restricts the material that may be considered in making that determination. However, when considered in the context of the statute, we conclude the Legislature intended to permit the court to review documents outside of the four corners of the petition when making its prima facie determination. We next explain.

As we discussed *ante*, before the trial court makes its initial prima facie determination under section 1170.95, subdivision (c), subdivision (b)(2) of that same section authorizes the court to conduct a facial review of the petition. Under subdivision (b)(2), the trial court may deny a petition without prejudice "[i]f any of the information required by [§ 1170.95, subd. (b)(1)] is missing from the petition and *cannot be readily ascertained by the court*." (Italics added.) Thus subdivision (b)(2) authorizes the court not only to ensure that the petition contains all the information required by the statute but also to look beyond the four corners of the petition and supply any required but missing information in the petition if such information may be "readily ascertained."

The statute does not specify what documents the court may review to readily ascertain information not included in the petition. But ascribing to that phrase its normal and ordinary meaning, such information would include documents in the court file clearly and reliably containing the missing information, including the abstract of judgment and any prior appellate opinions. (See *People v. Delgado* (2008) 43 Cal.4th 1059, 1070-1071 [abstracts of judgment are official prepared clerical records that are presumed reliable and accurate]; *People v. Trujillo* (2006) 40 Cal.4th 165, 180-181 [appellate opinions are part of the record of conviction].)

After the trial court completes its facial review of the petition to ensure its compliance with the statute, the court must then determine whether defendant has made a prima facie showing that he falls within the provisions of the statute. (§ 1170.95, subd. (c).) If, as defendant argues, the court was only permitted to review the four corners of

the petition in making that determination, the initial prima facie review would be entirely duplicative of the facial review under subdivision (b)(2). For example, here, defendant's petition recited almost verbatim the conditions for eligibility stated in subdivision (a), and it included only the bare information required by subdivision (b)(1) minus the year of conviction: a declaration stating his eligibility, the superior court case number, and his request to represent himself. If, as defendant suggests, the initial prima facie review of the petition was limited to its four corners, the facial review under subdivision (b)(2) and the prima facie review under subdivision (c) would be the same. As recently emphasized by our colleagues in the Second District, Division 7 in *People v. Verdugo, supra,* 44 Cal.App.5th at page 329, review granted, it is our duty to interpret statutes to give meaning to all provisions of the statute to the extent possible. Therefore, we decline to conclude that the initial prima facie review in section 1170.95, subdivision (c) is merely duplicative of subdivision (b)(2).

Further, it would make little sense for the Legislature to authorize the trial court to review readily ascertainable information in the record to provide necessary but missing information in the petition, but not allow the same court to review those same documents to determine whether petitioner has made a prima facie showing that he or she falls within the provisions of the statute.

Defendant's petition itself provides an apt illustration. Defendant failed to comply with the requirements of the statute by failing to include the year of his conviction on his petition, as required by section 1170.95, subdivision (b)(1)(B). Under subdivision (b)(2) the trial court was permitted to supply that missing information, which was readily ascertainable by reviewing, among other documents, the abstract of judgment. That same abstract of judgment also reflected that defendant was convicted of conspiracy to commit murder. The court correctly observed that conspiracy is a specific intent crime, and conspiracy to commit murder requires specific intent to commit murder. (See *People v. Swain* (1996) 12 Cal.4th 593, 602.) And, as the court then correctly concluded,

defendant's conviction for both conspiracy to commit murder and murder made it abundantly clear that defendant, even assuming he was not the actual killer, acted with the intent to kill as well as "aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree." (§ 189, subd. (e)(2).) The court's conclusion was an objective determination based on the elements of the counts of conviction. There are no circumstances in which convictions for murder and conspiracy to commit murder would not render defendant ineligible for relief under section 1170.95. Despite defendant's clear and obvious ineligibility for relief under the statute, he contends the trial court was permitted to review the abstract to determine the year of conviction but not to use that same document to reach the unimpeachable conclusion that defendant's convictions rendered him ineligible for relief. This makes no sense.

We conclude the documents provided to us in the record on appeal--sentencing minute orders, verdict forms, and the abstract of judgment--are readily available information that the trial court may review both to complete its facial review and to make its initial prima facie determination.[7] Where, as here, those documents clearly demonstrate that a defendant is ineligible for relief, the court may summarily deny the petition for failing to make a prima facie showing that he or she falls within the provisions of the statute.

Defendant contends he intended to argue to the trial court at the hearing on his petition that he was not guilty of conspiracy. He contends our appellate decision

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[7] Based on the court's observation that there was conflicting evidence as to who actually fired the fatal bullet, it appears that the court reviewed our nonpublished opinion affirming defendant's conviction on appeal in making the challenged determination. Indeed, defendant argues in his briefing that the court relied thereon, albeit without citation to the record. We note that the trial court could have facilitated our review by expressly stating which documents it reviewed in making its determination and suggest this practice be implemented in future such determinations.

determined that no conspiracy existed, and he points out that neither he nor his co-defendant confessed that a conspiracy existed. But defendant did not challenge the sufficiency of the evidence supporting his conviction, and we rejected his argument on appeal that his trial counsel was constitutionally ineffective in representing him. Further, a hearing conducted under section 1170.95, subdivision (d) is not an appropriate venue for relitigating claims related to his conviction, which was affirmed on appeal and is long since final.[8] (Slip Opinion, *supra*, at pp. 1, 16.) Moreover, there is no requirement that a defendant must confess to a conspiracy to be found guilty of entering into one. (See *People v. Herrera* (2000) 83 Cal.App.4th 46, 64 [describing elements of conspiracy].)[9] Defendant's assertions do not change our conclusion that there was no error in the trial court's summary denial of his petition.

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[8] A judgment is final " 'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . .' " (*People v. Kemp* (1974) 10 Cal.3d 611, 614.) The time to file a petition for a writ of certiorari in the United States Supreme Court is 90 days after judgment is entered by a state court of last resort or discretionary review is denied by a state court of last resort. (U.S. Supreme Ct. Rules, rule 13.1.) Our Supreme Court denied review of our opinion in defendant's direct appeal on November 25, 1997.

[9] Defendant additionally contends the trial court's summary denial of is petition violates the separation of powers doctrine and "subsumed the duties of the prosecutor and denied the right to a hearing to [defendant]." Because we conclude the trial court did not err in reviewing the record of conviction in determining whether defendant made his initial prima facie showing, we conclude defendant's remaining contentions are without merit.

## DISPOSITION

The order denying defendant's petition is affirmed.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Krause, J.